submit a written factual basis but the factual basis was recited into the record by the Assistant United States Attorney with certain objections and exceptions made by counsel for the Petitioner (Rec. Vol.9, pp.16-19). Petitioner, through counsel, specifically objected to and did not accept the allegations as to the amount of the loss (Rec. Vol.9, p. 19).

Pre-Sentence Report

Following the entry and acceptance of the plea by the district court a pre-sentence investigation report(PSR) was prepared. The PSR, in discussing the offense conduct, included information that was not a part of the factual basis for the plea, had not been proven beyond a reasonable doubt or stipulated or agreed to by Mr. Zollino. Such unproven information included a statement entitled "Victim Impact" in paragraph 13 which provided as follows:

> This offense involves at least 1,600 investor accounts. The total loss to investors was Four hundred twenty million, four hundred eighty-seven thousand, four hundred ninety-six dollars($420,487,496.00). Mr. Len B. Blackwell, with Price Waterhouse Coopers, is the trustee for IG and
>
> IWG Services, Ltd. and co-receiver for InverWorld, Inc. and InverWorld Securities, Inc. According to Mr. Blackwell, $78.7 million dollars have been recovered and disbursed to the victims.

(PSR paragraph 13).

The sentencing guideline calculation of offense level is set forth in paragraphs 16 through 28 of the PSR. According to the calculation, the total offense level was determined to be 36. That offense level was reached as follows:

Base offense level. The offense guideline producing the highest offense level, that for 18 U.S.C. §1956, Money Laundering, was used. That guideline, found in USSG §2S 1.1(a)(2), calls for a base offense level of 20. (PSR paragraph 18). Adjustments. An increase in offense level by 13 was applied based on the amount of total loss of $420,487,496.00 dollars. This was based on USSG §2S1.1(b)(2)(n). (PSR paragraph 19).

A four level increase was applied for role in the offense because Mr. Zollino was determined by the PSR to be an organizer or leader of a criminal activity that involved five or more participants. This adjustment was based on USSG §3B1.1(a). (PSR paragraph 21).

A two level increase was also recommended pursuant to USSG §3B1.3 because "the Defendant abused his position of power and trust as the chairman of the board for InverWorld, Inc., during the commission of the offenses." (PSR paragraph 22).

Total Offense Level: This resulted in a total adjusted offense level of 39. The pre-sentence report recommended a three level reduction in offense level for acceptance of responsibility under USSG §3E1.1(a) and (b)(2). (PSR paragraph 25). The resulting offense level was 36. (PSR paragraph 26). The pre-sentence report determined that Mr. Zollino had no criminal history and therefore his criminal history category was applied at I. (PSR paragraph 31). The sentencing guideline range of punishment set forth in the PSR, paragraph 50, provided that, based on the combined offense level of 36 and the criminal history category of I, the guideline range of imprisonment was 188 to 235 months. (PSR paragraph 50). The PSR provided for restitution in the amount of $ 341,787,496.00 dollars. (PSR paragraph 63).

Objections to Pre-Sentence Report

Prior to sentencing Mr. Zollino filed objections to the PSR. Many of the objections were to the determination of the amount of restitution which is a matter not supported in the record, not stipulated or agreed to upon entry of the plea and not otherwise proven to the Court. Mr. Zollino objected to paragraph 13 in which the PSR stated the total amount of the loss was $420,487,496.00 dollars(Objections to PSR pp.7-8). The objections included a complaint that the amount of the loss had not been established. (Objections to PSR p. 8). Mr. Zollino also objected to the increase in offense levels in the pre-sentence report pursuant to USSG §3B1.1. (Objections to PSR).

The adjustment for role in the offense increasing the offense by four levels as a result of being a leader or organizer of criminal activity involving five or more participants was objected to on the basis that there was no showing in the record that there were five or more participants in the criminal activity. Mr. Zollino also objected to the two level adjustment for role in the offense because of his position as Chairman of InverWorld, Inc. (Objections to PSR p.9). It was pointed out that others had decision making powers regarding InverWorld and the two level increase should not have been assessed. Mr. Zollino made additional objections to the recommended restitution figure, paragraph 63 of the pre-sentence report.(Objections to PSR, pp.11-12).

Sentencing Hearing

At the sentencing hearing on October 9, 2001, counsel for Mr. Zollino presented objections to the pre-sentence report and specifically to the amount of the loss calculation and restitution figure. (Rec. Vol. 10, pp.3-4).

In spite of Mr. Zollino's objections, and in spite of the lack of any evidence supporting the allegation as to the number of investors as well as the claim of the total amount of the loss,

the Court accepted those figures from the pre-sentence report:

> The Court is going to accept the number of investors and the total amount of loss for purposes of computing the guidelines, and I think that amount comes to $420,487,496.00 dollars and the Court finds that the Defendant made all of the significant decisions relating to the fraudulent behavior and abuse of position of power and trust as the head of the corporation, so the Court is going to overrule the objections.

(Rec. Vol. 10, p. 8).

There was never any evidence introduced to support the district court's findings. There was no explanation as to why a figure representing total assets under management at the time InverWorld entities were put under receivership related to the alleged total amount of the loss. Although it was "accepted" by the court for purposes of "computing the guidelines" (Rec. Vol 10, p.8), the court did not specify a restitution figure and left that issue open. (Rec. Vol. 10, pp.8-9).

Thereafter, on October 29, 2002, the court entered its written Judgment which ordered restitution in the amount of $341,787,496.00 dollars (Rec. Vol. 3, p. 495).

Utilizing the term "amount of the loss" was an erroneous conclusion by the Court and is a misnomer as Section 2S1.1 of the Sentencing Guidelines and specifically sub-section (a)(2), utilized by the Pre-sentence Report and the court to determine a guideline figure calls for a determination of the value of the laundered funds. There is nothing in the record to suggest that $420,487,496.00 dollars in funds were "laundered". In the commentary to the current sentencing guideline section 2S1.1, laundered funds is defined as "the property, funds or monetary instrument involved in the transaction, financial transaction, monetary transaction, transportation, transfer, or transmission in violation of 18 U.S.C.§1956 or §1957." There is no evidence in the record to

support a finding that more than 420 million dollars was "laundered". The procedure utilized by the district court undermined all the sentencing decisions. In the first instance, there was no factual support for the 420 million dollar figure. Second, there was no link shown between that number and the definition of laundered funds.

As a result, there was an insufficient basis for the determination of the amount of the loss. While the district court may adopt the pre-sentence report in making findings in response to a Defendant's challenges, the pre-sentence report must supply facts supporting its conclusion and the District Court must specifically adopt those findings. United States v. Tam, 240 F.3d 797 (9th Cir. 2001).

However, in the instant case there are no specific facts supplied in the pre-sentence report, only the hearsay conclusion from the receiver Mr. Blackwell. In United States v. Mahler, 984 F. 2d 899 (8th Cir. 1993), the sentence was reversed because the District Court failed to resolve an objection by the defendant that hearsay lacked sufficient indicia of reliability to be relied upon. In this case the Petitioner consistently challenged the $420 million dollar figure and complained that it was not reliable and not complete as to the actual facts of the case and any true losses to investors.

ARGUMENT

Petitioner's complaint is that the Court of Appeals committed error in refusing to issue a certificate of appealability based on his complaints raised under Blakely v. Washington. This Court's decision in Booker v. Washington was issued the day after the Court of Appeals denied the certificate of appealability and was raised in Petitioner's Motion for Rehearing.

A certificate of appealability (COA) may issue "only if the applicant has made a substantial showing of the denial of

a constitutional right." 28 U.S.C. §2253(c)(2). The COA determination under §2253(c) requires an overview of the claims in the habeas petition and a general assessment of their merits. Miller-El v. Cockrell, 537 U.S. 322, 336(2003). The certificate should issue if reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. Slack. v. McDaniel, 529 U.S. 473, 484 (2000). This inquiry does not require a showing that the appeal will succeed. Miller-El v. Cockrell, 537 U.S. at 337. A claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail. Miller-el v. Cockrell, at 339. Any doubt regarding whether to grant a COA is resolved in favor of the petitioner and the severity of the penalty may be considered in making this determination. Fuller v. Johnson, 114 F. 3d 491, 495(5th Cir. 1997).

Whether Mr. Zollino's sentence was determined in violation of the Sixth Amendment

In his §2255 Motion, Mr. Zollino objected to the calculation of his sentence under the United States Sentencing Guidelines. Specifically, he objected that the District Court committed error in:

a. Imposing a five point enhancement for being a leader or organizer of criminal activity involving five or more participants under USSG §3B1.1(a).

b. Imposing a thirteen point enhancement for amount of the loss under USSG §2S1.1(b)(2)(n).

There was another adjustment to the total offense level to which no specific objection was raised but which was objectionable under the Sixth Amendment as follows:

> A two level increase pursuant to USSG §3B1.3 because the Defendant abused his position of power and trust as the chairman of the board for InverWorld, Inc., during the commission of the offenses.

(PSR paragraph 22).

After giving Mr. Zollino credit for acceptance of responsibility, the PSR total offense level was computed at 36 with a sentencing range under criminal history category I of 188-235 months. Under the circumstances, it is no wonder Mr. Zollino agreed to a 144 month sentence. However, had Mr. Zollino's Sixth Amendment rights been given consideration under this Court's decision in United States v. Booker, the total offense level would have been 20 levels lower. There was no evidence introduced at the plea or sentencing hearing to support the guideline adjustments referenced above.

As a result, the total offense level as actually established at the sentencing hearing was 16 and the sentencing range should have been 21-27 months. Mr. Zollino was unfairly pressed into accepting the onerous plea agreement offered by the government based on the belief that his guideline sentence could be even greater based on fact findings not required to be made by a jury at a contested due process trial and based on a standard of a preponderance of the evidence with the findings based primarily on a report of a United States Probation Officer.

Waiver Issues

Plea Agreement to Specific Sentence

The District Court concluded, in part, that Mr. Zollino had waived complaints regarding guideline sentencing because of his plea agreement regarding a specific sentence of 144 months pursuant to Fed. R. Crim. P. 11(c)(1)(C). However, had

Mr. Zollino been aware of the constitutional requirements for determining a sentence under the Sentencing Guidelines and had he not been facing the threat of a pre-Booker guideline sentencing scheme, he would not have entered into such a plea agreement and the result would have been different. It is now known, under United States v. Booker, that Mr. Zollino had strong grounds to object to the use of the guidelines in determining his sentence and that, had the District Court, under the PSR as produced in the case, sentenced Mr. Zollino under the Sentencing Guidelines and in accordance with the Sixth Amendment, prohibiting enhancements unless proven beyond a reasonable doubt to a jury, the sentencing range under the guidelines would have been significantly lower (21-27 months as opposed to 188-235 months) and Mr. Zollino would not have had the same reason to agree to a 144 month sentence under Fed. R. Crim. P. 11(c)(1)(C).

Failure to Raise Sentencing Complaints on Direct Appeal

The district court also stated that the failure of Mr. Zollino to raise the sentencing errors which resulted in the increased offense level under the Sentencing Guidelines had not been raised by him on direct appeal. As a result, the court stated that when a petitioner fails to raise an issue on direct appeal, collateral review is barred unless the petitioner demonstrates cause for that failure and actual prejudice as a result of the alleged violation of federal law, citing Edwards v. Carpenter, 529 U.S. 446, 451 (2000); and United States v. Cervantes, 132 F.3d 1106, 1109 (Rec. Vol.4,p.27). Mr. Zollino can show cause for the failure to raise his sentencing objections on direct appeal. As part of his plea agreement Mr. Zollino executed an appeal waiver. However, that waiver was ineffective because the district court failed to admonish him regarding the appeal waiver at the time of the entry of the guilty plea. United States v. Robinson, 187 F.3d 516, 517-

518(5th Cir. 1999)(Rec. Vol.9).

Mr. Zollino, who did not have post-conviction benefit of counsel, was not aware of this fact and did not file an appeal. The instant case is different from the situation cited in the Magistrate's Memorandum and Recommendation in Garcia-Santos v. United States, 273 F.3d 506, 508 (2d Cir.2001)(Rec. Vol. 4, p. 27). In that case the court found that a waiver of appeal did not constitute cause for failing to appeal the sentencing issues. However, in that case the court found that the defendant had entered into his plea agreement knowingly and voluntarily and with awareness of his waiver of appeal and collateral attack. Garcia-Santos v. U.S., 273 F.3d 506,508 (2d Cir. 2001). In the instant case, such a finding would be inappropriate as the district court failed to admonish Mr. Zollino regarding his appeal waiver and therefore the waiver cannot be seen as effective. Thereafter, because of Mr. Zollino's lack of counsel post-conviction he was not aware that he had the right to appeal and therefore did not raise these issues on appeal.

Such constitutes cause for failing to appeal the sentencing issues. As a result, the district court erred in adopting the Memorandum and Recommendation of the Magistrate that collateral relief was barred as to the sentencing issues. The Memorandum and Recommendation concluded that due to the waiver Zollino would only be entitled to relief if he could establish a fundamental miscarriage of justice (Rec. Vol., p. 27). The lower court was incorrect, he was not required to meet that standard.

Impact of United States v. Booker

Petitioner has contended that based on this Court's decision in United States v. Booker, the sentencing level determination employed in the District Court was improper and was a violation of Petitioner's Sixth Amendment right to a jury

trial. Had the District Court followed the requirements of the Sixth Amendment in determining Petitioner's offense level under the United States Sentencing Guidelines, the offense level would have been significantly reduced.

Petitioner Asserted in the Court of Appeals that His Sixth Amendment Claim Could Be Addressed on Collateral Review and That His Sixth Amendment Claim was Reviewable As Plain Error

This Court's decisions in United States v. Booker, and Blakely v. Washington, should be seen as a new rule that has retroactive application to cases on collateral review. In Blakely, this Court explained that the statutory maximum for Apprendi purposes is the maximum sentence a Judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the Defendant. Blakely, Id. The definition of statutory maximum sentence in Blakely is not limited to the maximum sentence identified by the legislature in a criminal statute. Instead, the sentencing court is limited to the highest sentence authorized by facts found by the jury or admitted by the Defendant at a plea hearing, whether those facts may be sentencing factors or the elements of the crime listed by the legislature, and whether the maximum sentence may be stated in sentencing guidelines or in a statute. In Booker, this Court held that the rule announced in Blakely applies to the United States Sentencing Guidelines.

Blakely and Booker were not dictated by precedent, and thus represent a new constitutional rule of criminal procedure under Teague v. Lane, 489 U.S. 288, 299-301 (1989), which should apply retroactively. In Teague, this Court recognized the general principal that new procedural rules are not applied retroactively to cases on collateral review, but identified an exception for "watershed" decisions critical to the fundamental fairness and accuracy of the criminal process. 489 U.S. at 311.

As this Court has clarified, this exception "give[s] retroactive effect to only a small set of watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding. That a new procedural rule is fundamental in some abstract sense is not enough; the rule must be one without which the likelihood of an accurate conviction is seriously diminished. This class of rules is extremely narrow and it is unlikely that any..."has yet to emerge." Schriro v. Summerlin, 2004 WL 1402732 (June 24, 2004)(quoting Saffle v. Parks, 494 U.S. 484, 495 (1990) (quoting Teague, 489 U.S. at 311) and Tyler v. Cain, 533 U.S. 656, 667 n.7 (2001) (emphasis in Summerlin).

In Summerlin, decided the same date as Blakely, this Court ruled that Ring v. Arizona, 536 U.S. 584 (2002), was not retroactively applicable to cases on collateral review. In Ring this Court applied Apprendi to require jury findings of aggravated facts supporting a death sentence, but the only issues involved the identity of the factfinder, since the statute at issue there already required the judge to make findings of aggravated facts supporting death beyond a reasonable doubt. Ring, 536 U.S. at 597, 609. In turn, thus, Summerlin involved the finder of fact but not the standard of proof, Summerlin, 2004 WL 1402732 at 2n.1. Writing for the majority, Justice Scalia states in Summerlin that "[t]he right to jury trial is fundamental to our system of criminal procedure," Id. at 7, and as the dissenting justices note, "[t]he majority does not deny that Ring meets the first criterion of Teague, that is holding is "implicit in the concept of ordered liberty." Id. The Court declined to find retroactivity instead on a secondary inquiry involving accuracy, explaining that the question was not whether juries or judges were more accurate findings of fact, but "whether judicial factfinding so "seriously diminishes" accuracy that there is an "impermissibly large risk" of punishing conduct the law does not reach." Summerlin, 2004 WL 1402732 at 5 (quoting Teague, 312-13 (quoting Desist v. United States, 394 U.S. 244, 262 (1969) (Harlan, J.

dissenting)). The Court found the evidence to be "simply too equivocal to support that conclusion." Id.

In contrast to Ring, Blakely and Booker's application to the federal Sentencing Guidelines requires jury findings beyond a reasonable doubt. This Court explained the crucial nature of this right in In re Winship:

> The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error...'[A] person accused of a crime...would be at a severe disadvantage, a disadvantage amounting to a lack of fundamental fairness, if he could be adjudged guilty and imprisoned for years on the strength of the same evidence as would suffice in a civil case'...
>
> There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value–as a criminal defendant his liberty–this margin of error is reduced as to him by the process of placing on the other party the burden of...persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt. Due process commands that no man shall lose his liberty unless the Government has borne the burden of...convincing the factfinder of his guilt.' To this end, the reasonable-doubt standard is indispensable, for it 'impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue.'

In re Winship, 397 U.S. 358, 363-64 (1970) (citations omitted). A defendant who exercised the right to jury trial is

also protected by the right to confront witnesses, to remain silent, to compel the presence of witnesses and to present a defense, as well as evidentiary rights such as hearsay rules. If a defendant pleads guilty, proceedings under Fed. R. Crim. P. 11 require the court to obtain a waiver from the defendant of those rights explicitly–and in person. As recognized in Blakely, the right not to have one's maximum sentence substantially increased absent these protections is equally as crucial to liberty and due process as the right not to be convicted without such protections. Federal sentencing proceedings conducted without a reasonable-doubt standard of proof, and without the evidentiary and other rights granted at trial or at a plea hearing, are seriously lacking in those protections that serve to promote factual accuracy. See e.g., United States v. Green, 2004 WL 1381101, 33, 35 (D.Mass June 18, 2004) ("Although the First Circuit has denied "that the Apprendi rule can be characterized as a watershed rule of criminal procedure," there can be little doubt that the requirement of proof beyond a reasonable doubt and the right to have a jury determine facts that expose a defendant to greater punishment are among the surest guarantees that an individual will not be deprived of her liberty in error" (citing United States v. Sepulveda, 330 F. 3d 55, 60 (1st Cir. 2003)), also noting confrontation and other rights associated with jury trial). In contrast to the right to have a jury instead of a judge decide a particular fact, judicial factfinding by a preponderance of the evidence, in many cases based on hearsay, "so seriously diminishes] accuracy that there is an "impermissibly large risk" of punishing conduct the law does not reach." Summerlin, (citing Teague, 312-13 and Desist, 394 U.S. at 262). Accordingly, it should be found that Blakely and Booker, in contrast to Ring, recognize a new watershed rule of constitutional procedure applicable to cases pending on collateral review.

Mr. Zollino did not specifically raise the Sixth Amendment issue from Blakely v. Washington in his

complaints about his sentence in his motion under 28 U.S.C.§2255.

Where an Appellant has not lodged a contemporaneous objection to the trial court, an appellate court may reverse only if the district court committed plain error. Plain error review is mandated by Federal Rule of Criminal Procedure 52(b). Before considering reversal under that rule, the Appellate Court must first find that the district court committed an unwaived error. Waiver is an intentional relinquishment or abandonment of a known right. Johnson v. Zerbst, 304 U.S. 458, 464 (1938). The error must be plain, that is, clear and obvious under current law. Current law means the law prevailing at the time of appeal. United States v. Webster, 84 F.3d 1056,1067 (8th Cir. 1996). Mr. Zollino submitted this issue due to a change in law that occurred during the pendency of his appeal.

Finally, Mr. Zollino must show that the error affected his substantial rights by prejudicially influencing the outcome of the district court proceedings. United States v. Olano, 507 U.S. 725, 732-735 (1993). An appellate court should exercise its discretion to correct unpreserved errors in the Appellant's favor where the error seriously affects the fairness, integrity or public reputation of judicial proceedings. Id. at 736. Mr. Zollino presented his arguments on the sentencing error in his case in light of the decision in United States v. Booker, to illustrate how his substantial rights to a fair and constitutionally mandated procedure were adversely affected and how such errors seriously affected the fairness, integrity and public reputation of judicial proceedings.

CONCLUSION

WHEREFORE, Petitioner Jose Zollino respectfully requests that this Honorable Court grant this petition and issue a Writ of Certiorari and review the decision of the United States Court of Appeals for the Fifth Circuit denying the issuance of a Certificate of Appealability and review the question of whether the Court of Appeals should have issued

a Certificate of Appealability on his question raised for the first time in the Motion for Issuance of Certificate of Appealability as to whether he is entitled to a new sentencing hearing based on the decisions of this Court in Blakely v. Washington and United States v. Booker.

Respectfully submitted,

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